

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN BEELER,

Defendant-Appellant.

UNPUBLISHED

January 11, 2005

No. 250927

Kent Circuit Court

LC No. 02-009541-FH

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant was found guilty by a jury of assault with intent to do great bodily harm, MCL 750.84, for his participation in the beating of Steven Kitchen. He was sentenced to serve 3 to 10 years' imprisonment. He appeals as of right. We affirm.

Defendant first alleges that the prosecutor committed misconduct during opening statement. Because defendant failed to object below, this issue is waived unless there was plain error affecting defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

The following statements of the prosecutor draw defendant's objections:

Everything in life has a beginning, a middle, and an end. You're going to hear testimony in this case regarding the beginning, middle, and perhaps the end of the life of [Steven Kitchen].

* * *

Prior to August 16 [Steven Kitchen] was able to walk, talk, speak, and associate with anyone he chose to in this world. Now he can't think. He can't speak. His walking he can't do. [sic] His standing is getting a little better with some assistance. He may be able to shake your hand. But [Steven Kitchen] this date doesn't know what happened to him. This happened in August. [Steven Kitchen] has been in a coma for a very long time. The doctor will tell you about his coma status and what happened in the days and months following that.

Opening argument is the appropriate time to state the facts, which will be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). When a prosecutor states that evidence will be presented, which later is not presented, reversal is not required if the prosecutor acted in good faith and the defendant was not prejudiced by the statement. *Id.*; *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). A prosecutor need not confine his arguments to the blandest possible terms. *Johnson*, *supra* at 625.

Defendant argues that the statements were inflammatory because they led the jury to believe, without hearing directly from any witness, that the victim nearly died, was still at death's door, and was currently living in a severely impaired condition. But the evidence introduced at trial and reasonable inferences based on that evidence lead to the same conclusions that the prosecutor stated. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). But he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Id.* The jurors viewed graphic photographs taken of the victim shortly after the assault and heard from a treating physician who described the victim's severe internal and external injuries. The physician discussed the victim's coma status, noted his treatment at a nursing home after spending several weeks at the hospital, and testified to the severity of the victim's injuries, which were potentially life threatening. The testimony of the doctor, coupled with the photographic evidence, directly or inferentially supports the prosecutor's statements. And we do not find the prosecutor's statements to be so outrageous such that defendant was prejudiced despite their truthfulness. Therefore, defendant has failed to show plain error affecting his substantial rights.

Defendant also challenges the scoring that the trial court imposed for the offense variables (OV) of psychological damage and brutality to the victim. The existence or nonexistence of a particular sentencing factor is a factual determination for the trial court and is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). An appellate court will leave undisturbed scoring decisions for which there is any evidence in support. See, e.g., *People v Mitchell*, 454 Mich 145, 176 n 37; 560 NW2d 600 (1997); *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant first challenges the scoring of OV 4. Ten points is appropriate under OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The statute orders a score of ten points if "the serious psychological injury *may* require professional treatment." MCL 777.34(2) (emphasis added). The fact that treatment has not been sought is not conclusive. *Id.* We find that the record supports the trial court's finding of psychological damage. One could infer from the severity and extent of the victim's injuries and the length of his recovery that he suffered serious psychological injury. Defendant cites no authority requiring that evidence supporting a finding under OV 4 must be direct evidence. Furthermore, the prosecutor told the court at sentencing that a representative from the victim's nursing home said that the victim was being treated by a social worker for his psychological injury. Because a sentencing court may rely on hearsay, there was sufficient evidence to support the score for OV 4.

We also affirm the trial court's scoring of OV 7. Fifty points is appropriate under OV 7 for aggravated physical abuse, which includes "excessive brutality." MCL 777.37(a). The

record has ample evidence supporting a finding of excessive brutality. The evidence indicated that defendant was part of a large group that repeatedly kicked the victim, who did not fight back, in the chest and head. When the group dispersed, defendant assaulted the victim one last time while the victim was either prone or stumbling with his back to defendant. Though witnesses disagreed as to the manner in which defendant struck the victim and whether the blow alone rendered the victim motionless and unresponsive, the fact that defendant struck last and the victim did not get up afterwards was undisputed. Finally, defendant fled the scene and abandoned the seriously injured victim. The trial court's scoring of OV 7 at fifty points was not clear error.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra